Denver Law Review

Volume 62
Issue 1 *Tenth Circuit Surveys*

Article 19

February 2021

Labor Law

Greg Shannon Russi

Follow this and additional works at: https://digitalcommons.du.edu/dlr

Recommended Citation
Greg Shannon Russi, Labor Law, 62 Denv. U. L. Rev. 253 (1985).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

LABOR LAW

OVERVIEW

The Tenth Circuit handed down four labor opinions during this survey which merit review. Two additional cases are mentioned in brief. In *Consolidation Coal Co. v. United Mine Workers of America, Local 1261*,[1] the Tenth Circuit applied only agency theory in determining that a local union was not liable for damages due to an unauthorized strike. In so holding, the court extended to local unions the Supreme Court's test for determining parent union liability. In *Artra Group, Inc. v. NLRB*,[2] the court enforced a *Gissel* bargaining order and applied the *Wright Line* "mixed motive" analysis to uphold the National Labor Relations Board's (NLRB or Board) rejection of the employer's economic necessity defense in the face of alleged anti-union animus. In *Southwest Community Health Services v. NLRB*,[3] the Tenth Circuit held that the Board failed to apply the correct standard in certifying a bargaining unit composed of medical technicians and paramedics. The case was remanded to the Board to determine the correct bargaining unit under the "disparity of interests" standard. In *Barnett v. United Air Lines, Inc.*,[4] the Tenth Circuit reversed a district court ruling as to the applicable statute of limitations in a "hybrid contract" suit which sought vacation of an arbitration award under the Railway Labor Act (RLA). The court applied the six-month statute of limitations under section 10(b) of the National Labor Relations Act (NLRA) rather than the two year limitation under the RLA. *Donovan v. United Video, Inc.*,[5] and *Jefferson County Community Center for Developmental Disabilities, Inc.*,[6] are discussed briefly.

I. UNION LIABILITY FOR DAMAGES CAUSED BY UNAUTHORIZED STRIKES

In *Consolidation Coal Co. v. United Mine Workers of America, Local 1261*,[7] the court held that a union local was not liable for damages caused by an unauthorized strike where local officials played no part in instigating or condoning the walkout. In affirming the district court's summary judgment decree, the circuit applied only agency theory to the facts of the case. The court determined that the "best efforts" and "mass action" theories were no longer valid in view of the Supreme Court's decision in *Carbon Fuel Co. v. United Mine Workers of America*.[8] *Consolidation* extends to

1. 725 F.2d 1258 (10th Cir. 1984). *See infra* text accompanying notes 7-47.
2. 730 F.2d 586 (10th Cir. 1984). *See infra* text accompanying notes 48-88.
3. 726 F.2d 611 (10th Cir. 1984). *See infra* text accompanying notes 89-131.
4. 738 F.2d 358 (10th Cir.), *cert. denied*, 105 S. Ct. 594 (1984). *See infra* text accompanying notes 132-52.
5. 725 F.2d 577 (10th Cir. 1984). *See infra* text accompanying notes 153-62.
6. 732 F.2d 122 (10th Cir.), *cert. denied*, 105 S. Ct. 591 (1984). *See infra* text accompanying notes 163-71.
7. 725 F.2d 1258 (10th Cir. 1984), *aff'g* 500 F. Supp. 72 (D. Utah 1980).
8. 444 U.S. 212 (1979).

local unions the Court's most recent pronouncements on parent union liability.[9]

A. *Facts of* Consolidation

The employer, operator of a coal mine in Emery County, Utah, brought suit against the local union seeking injunctive relief and damages following an unauthorized walkout at the mine. The walkout took place pursuant to worker dissatisfaction with the handling of a grievance filed by a fellow union member. Local officials met immediately after the walkout with the mine superintendent, but were unable to persuade the membership to return to work. One local official remained on the job until threats convinced him to leave work. The union threatened internal disciplinary action and broadcasted radio announcements in an effort to end the walkout, but work did not resume until 72 hours after the strike commenced.[10] The district court denied injunctive relief and found the local union not liable under any theory of liability.[11]

B. *Theories of Liability for Damages Pursuant to Unauthorized Walkouts*

Courts have defined three theories of liability for employer damages pursuant to unauthorized walkouts where a no-strike obligation exists in the collective bargaining agreement.

1. Agency Theory

Under Section 301(b)[12] of the Labor Management Relations Act (LMRA), any labor organization, be it a union or employer, "shall be bound by the acts of its agents." Section 301(e)[13] further defines the role of an agent and follows the principles of apparent authority by stating that "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." Thus, an agent's actions may bind a union under the common law rules of agency regardless of whether those actions were specifically authorized or ratified. Under agency theory, courts examine the actions of stewards, committeemen, and union officers for indications of ratification of a strike in breach of a no-strike obligation.[14] The Third Circuit has noted that failure of local union officials to repudiate a purported agent's ordering of a strike may constitute ratification of the agent's actions whether or not he had authority.[15]

9. *See, e.g.*, Complete Auto Transit v. Reis, 451 U.S. 401 (1981) (individual union members not liable regardless of whether union found liable); Carbon Fuel Co. v. United Mine Workers of America, 444 U.S. 212 (1979) (parent unions not liable under "mass action" or "best efforts" theories); Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962) (individual members not liable where union found liable for strike damages).

10. 725 F.2d at 1259-60.

11. *Id.* at 1260.

12. 29 U.S.C. § 185(b) (1982).

13. 29 U.S.C. § 185(e) (1982).

14. Eazor Express, Inc. v. International Bhd. of Teamsters, 520 F.2d 951, 963 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1976).

15. *Id.* at 964.

It is clear, however, that union officials and rank-and-file members are not individually liable for wildcat strikes. In *Atkinson v. Sinclair Refining Co.*,[16] the Supreme Court held that when a union is found liable for damages due to breach of a no-strike clause, its officers and members are not individually liable.[17] Likewise, in *Sinclair Oil Corp. v. Oil, Chemical & Atomic Workers International Union*,[18] the Court announced that when a union is not liable for breach of a no-strike agreement, no remedy for damages attends against members individually.[19]

2. Mass Action

A second theory of liability has been used where large groups of workers walk off the job en masse. Mass action is thought to have originated in 1948 when a district court ventured that "the idea . . . that . . . 350,000 to 450,000 men would all get the same idea at once, independently of leadership, and walk out of the mines, is of course simply ridiculous."[20]

The Third Circuit clarified mass action in *Eazor Express Inc. v. International Brotherhood of Teamsters*,[21] concluding "large groups of men do not act collectively without leadership . . . a functioning union must be held responsible for the mass action of its members."[22] Mass action differs from pure agency theory in that authority and ratification are inferred from the concerted action of a large labor organization. In *Carbon Fuel*, the Supreme Court undertook the question of whether mass action could be applied to find liability on behalf of an international or district union even though the parent unions had no involvement with the local's unauthorized walkout. The Court disavowed *Eazor Express*[23] and cited the Fourth Circuit's decision in *United Construction Workers v. Haislip Baking Co.*[24] for the proposition that "there is [no] responsibility on the

16. 370 U.S. 238 (1962).

17. *Id.* at 247-48 (discussing section 301(b) of the Labor Management Relations Act, 29 U.S.C. § 185(b) (1982)).

18. 452 F.2d 49 (7th Cir. 1971).

19. *Id.* at 52 (citing Atkins v. Sinclair Refining Co., 370 U.S. 238 (1962)).

20. United States v. United Mine Workers, 77 F. Supp. 563, 566 (D.D.C. 1948), *aff'd*, 177 F.2d 29 (D.C. Cir.), *cert. denied*, 338 U.S. 871 (1949).

21. 520 F.2d 951 (3d Cir. 1975).

22. *Id.* at 963 (citations omitted).

23. 444 U.S. at 215. *Eazor Express* involved a strike over questionable discharges at a loading dock in northeastern Ohio and an immediately subsequent sympathy strike by a second local union at Pittsburgh, thereby implicating responsibility to the Teamster International. Both strikes were in breach of no-strike obligations and neither was submitted to the grievance machinery for resolution. The court found that neither local union instigated or ratified the walkouts, but that the International as party to the collective bargaining agreement nonetheless became liable to the employers 24 hours after the second walkout began. The parent union's failure to use "all reasonable means to end the unauthorized strike" in violation of the no-strike obligation was deemed the proximate cause of employer's damages. *Eazor Express*, 520 F.2d at 965-66.

24. *Carbon Fuel*, 444 U.S. at 215 (citing *Haislip Baking*, 223 F.2d 872 (4th Cir. 1955)). In *Haislip Baking*, the Fourth Circuit reversed a jury verdict against defendant national unions. *Haislip Baking* arose over the dismissal of two employees and a subsequent walkout by the entire bargaining unit. The circuit stated that employees involved in unauthorized walkouts may lose some federal protections, but there is no responsibility on behalf of the

part of a union for a strike with which it has had nothing to do."[25] Fundamental to the court's refusal to recognize mass action was Congress' clear intention under section 301[26] to limit liability to situations where agency could be found.[27]

3. Best Efforts

Closely related to the mass action theory is the best efforts theory, which the Third Circuit also championed in *Eazor Express*.[28] Best efforts is based solely on the obligation of a union to use all reasonable means to end a walkout where the union is party to a no-strike clause and the accompanying arbitration process. The Third Circuit said that in the case of a suit for damages incurred during an unauthorized walkout, a union is estopped to disclaim responsibility unless it has used all reasonable means to end the walkout.[29] Thus, best efforts can be distinguished from the two theories set forth above as being based on contractual other than agency principles. It should be noted though, that in the case of an unauthorized walkout, neither of the parties to a collective bargaining agreement realistically could be held to the obligation if the walkout was not conceived, advocated, or ratified by union officials. Rather, the walkout is the responsibility of individual workers who are not party to the agreement. In *Carbon Fuel*, the Supreme Court doused "best efforts" by finding that a union which repeatedly disavowed wildcat strikes could not be found liable for failure to use all reasonable means to end a wildcat walkout simply because Congressional policy favors arbitrating industrial disputes.[30] Furthermore, the Court clarified its position on the contractual foundation of best efforts liability, stating that unless full responsibility for wildcat walkouts appears as a bargained-for provision in a collective bargaining agreement such responsibility could not be read into the parties' contract.[31]

C. *The Tenth Circuit's Interpretation of* Carbon Fuel *in* Consolidation

In *Consolidation* the Tenth Circuit upheld the lower court ruling, refusing to find the local liable under mass action or best efforts theories.[32] The Court applied agency theory to the facts but found no evidence to suggest the local "instigated, supported, ratified, or encouraged the actions" of the mine workers in their decision to walk

union for a strike in which it took no part. The litigants in *Haislip Baking* were parties to a no-strike pledge similar to that in *Eazor Express*, *supra* note 23.

25. 223 F.2d at 877.

26. 29 U.S.C. § 185 (1982) provides a cause of action in contract by or against labor organizations.

27. *See, e.g.*, *Carbon Fuel*, 444 U.S. at 217.

28. 520 F.2d 959. "Best efforts" is also known as the "all reasonable means" test. *See id.* at 959-60.

29. *Id.*

30. 444 U.S. at 218.

31. *Id.* at 221-22.

32. 725 F.2d at 1260.

out.[33] Significantly, the court held that the Supreme Court's decision in *Carbon Fuel* applied to local unions, even though the Court in *Carbon Fuel* considered only the obligations of parent unions.[34] The circuit court was careful not to preclude best efforts or mass action theories of liability where the parties have specifically bargained for an "all reasonable means" obligation in their agreement.[35]

D. *Conclusion*

The Tenth Circuit's opinion in *Consolidation* is firmly in line with *Carbon Fuel* in holding that neither mass action nor best efforts survived the Supreme Court's decision. The fact that mass action and best efforts theories are usually applied to local unions coupled with the reminder that *Carbon Fuel* pertained solely to parent unions, indicates a conceptual leap by the Tenth Circuit in *Consolidation*. By extending the Court's holding in *Carbon Fuel* to local unions, the court of appeals has clarified the boundaries of agency liability. That the Court in *Carbon Fuel* failed to find union liability based only upon an arbitration clause where the parties have not bargained for an explicit obligation to use all reasonable means to end a wildcat strike[36] is broad enough to discredit the best efforts theory at all levels of union hierarchy.

Likewise, the Court's indictment of *Eazor* and endorsement of *Hailip* on the issue of a union's lack of responsibility for strikes in which it is not involved[37] is sufficiently broad to discredit the mass action theory at all levels. In reviewing the legislative history of section 301, the Court seems to have convinced itself that Congress took great care to construct a shield of immunity around unions which could only be broken by proof of agency.[38] Mass action liability infers authority and ratification from the circumstances, but it does not require proof of these elements of agency theory.

The other circuits have not interpreted *Carbon Fuel* as applicable to locals. The Fourth Circuit, champion of "mass action," stated in *Consolidation Coal Co. v. Local 1702, United Mine Workers of America*[39] that the mass action theory remains "a sensible and pragmatic approach to this difficult problem in the area of labor relations."[40] The circuit applied mass action to a local union, distinguishing *Carbon Fuel* based upon the

33. *Id.* at 1263. In a footnote the court of appeals pointed out that the district court had found no ratification of the wildcat strike by the failure of union officials, in the face of threats, to work their preassigned shifts in the three-days walkout. *Id.* n.12. *But see* Consolidated Coal Co. v. Local 1702 United Mine Workers, 709 F.2d 882, 884, 886 (4th Cir.), *cert. denied*, 104 S. Ct. 487 (1983).

34. 444 U.S. at 215 n.3; 725 F.2d at 1261 n.7.

35. *Id.* at 1263 n.11; *accord Carbon Fuel* 444 U.S. at 721-22.

36. 444 U.S. at 218.

37. *Id.* at 215.

38. *Id.* at 218.

39. 709 F.2d 882 (4th Cir. 1983).

40. *Id.* at 885 (quoting *Carbon Fuel*, 582 F.2d 1346, 1349-50 (4th Cir. 1978), *aff'd*, 444 U.S. 212 (1979)).

Court having only the district and international unions before it.[41] The Fourth Circuit had affirmed a finding of liability against the local unions in *Carbon Fuel*[42] based on the mass action theory of liability, and appears reluctant to retreat from its holding.

In *North River Energy Corp. v. United Mine Workers of America*,[43] the Eleventh Circuit, without mentioning *Carbon Fuel*, affirmed the validity of the mass action theory but declined to apply it to an Alabama wildcat strike. In explaining its view of mass action the court sought a "correlation" between the actions of the union as an entity speaking and acting through its officers, and the actions of its membership.[44] This language suggests a test more strict than that of *Eazor Express* which looks only to large concert of unlawful action regardless of what union leaders might have said or done in instigating a walkout; thus, the *Eazor Express* criteria is similar to a strict liability test.

The Tenth Circuit in *Consolidation* follows a parade of cases which make recovery of damages for wildcat walkouts increasingly difficult.[45] Because individual union members can not be found liable for damages, and union entities are shielded from liability unless their leadership has taken an active role, employers can only look to the bargaining agreement[46] or *Boys Markets* injunctions[47] for relief.

II. BARGAINING ORDERS AND BURDEN OF PROOF

A. NLRB v. Gissel Packing Co.

In *NLRB v. Gissel Packing Co.*,[48] the Supreme Court upheld the Board's practice of compelling employers to bargain with a designated union where the employer has engaged in unfair labor practices sufficient to render a certification election biased.[49] The Court found the Board issuance of a bargaining order to be a valid alternative remedy to

41. The Fourth Circuit also found the local union liable under agency theory. By taking only actions which were "foreseeably ineffective," the local union had ratified and tacitly encouraged the strike. *Consolidation Coal*, 709 F.2d at 885-86.

42. Carbon Fuel Co. v. United Mine Workers of America, 582 F.2d 1346 (4th Cir. 1978), *aff'd* 444 U.S. 212 (1979).

43. 664 F.2d 1184 (11th Cir. 1981).

44. *Id.* at 1194 (citing *Consolidation Coal Co.*, 500 F. Supp. at 77).

45. *See supra*, note 9.

46. The controlling principle after *Carbon Fuel* is that such a contract term must be bargained-for and specific as to each party's duties, and not ambiguously stated, e.g., when the parties "agree and affirm that they will maintain the integrity of this contract." *See Carbon Fuel*, 444 U.S. at 216.

47. Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235 (1970). *Boys Markets* provides an exception to the no injunction rule of the Norris-LaGuardia Act. Specifically, an action in equity to enjoin a strike can only be had where the strike is over a grievance which both parties have agreed to arbitrate, and the employer should be compelled to arbitrate such a grievance. *Id.* at 254 (citing Sinclar Refining Co. v. Atkinson, 370 U.S. 195, 228 (1970) (Brennan, J., dissenting)). All other principles of equity attendant to an injunction order must be met.

48. 395 U.S. 575 (1969).

49. *Gissel Packing*, 395 U.S. at 600. The National Labor Relations Act enumerates unfair labor practices which can be committed by an employer in section 8(a), 29 U.S.C. § 158(a)(1)-(5) (1982).

an election where the employer abrogates his duty to bargain in good faith under the NLRA.[50] Under *Gissel*, the Board may determine whether an employer's anti-union campaign constitutes unfair labor practices to the extent a cease and desist order is inadequate, or where an employer's activities have been so egregious that a bargaining order is the only fair remedy.[51] The Court's decision in *Gissel* precludes employers' from delaying elections while the Board considers whether evidence warrants a cease and desist order.[52] The Court in *Gissel* was quick to point out, and the Tenth Circuit has repeated, however, that a bargaining order is not a permanent remedy.[53] Employees may always decertify a union after the Board orders bargaining.[54]

B. NLRB v. Wright Line

In *NLRB v. Wright Line, A Division of Wright Line, Inc.*,[55] the First Circuit affirmed the Board's procedural analysis in "mixed motive cases" where an employee alleges his discharge or discipline resulted from anti-union animus and the employer asserts valid motives from such action.[56] Anti-union animus can be defined broadly as prejudicial hiring, firing, or administration of work rules based upon employees' exercise of activities protected under sections seven[57] and eight[58] of the NLRA. Under the "partial motivation test"[59] used prior to *Wright Line*, the Board could order reinstatement of an employee accused of bad conduct whenever the General Counsel could prove dismissal was based partially on union activism. Hence, the rule left union proponents insulated from discharge or appropriate discipline regardless of their employment activity.[60]

Under the *Wright Line* analysis, a "but for" test is applied to determine whether a discharge would have occurred regardless of the employee's pro-union actions.[61] Once the general counsel establishes the prima facie existence of an unfair labor practice, i.e., "discrimination in regard to hire or tenure of employment,"[62] the burden of *production* shifts to the employer to show that no unfair labor practice occurred and that the employee would have been discharged regardless of his union

50. The duty of bargaining in good faith arises under section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1982).

51. *Gissel Packing*, 395 U.S. at 610-14.

52. *Id.* at 610-11.

53. *Id.* at 613 (citing Franks Bros. Co. v. NLRB, 321 U.S. 702, 705-06 (1944)); NLRB v. Groendyke Transport, Inc., 417 F.2d 33, 35 (10th Cir. 1969) (citing *Franks Bros.*, 321 U.S. 702), *cert. denied*, 397 U.S. 935 (1970).

54. *See, e.g.*, *Gissel Packing*, 395 U.S. at 613.

55. 662 F.2d 899 (1st Cir. 1981).

56. *Id.* at 907.

57. 29 U.S.C. § 157 (1982). Section 7 protects workers' right to form and join a union, bargain collectively, and engage in concerted activities.

58. 29 U.S.C. § 158 (1982). *See supra* note 49.

59. *Wright Line*, 662 F.2d at 902.

60. *Id.* (citations omitted).

61. *Id.* at 903.

62. 29 U.S.C. § 158(a)(3) (1982).

activity.[63] The General Counsel still has the burden of showing by a preponderance that an unfair labor practice transpired, i.e., but for the employee's union related activities he would not have been dismissed.[64] Thus, section 10(c) of the NLRA,[65] requiring the Board to prove all elements of an unfair labor practice, was not violated because the company was not presented with a greater burden of persuasion than that which the Board could properly shift to it.[66]

The Supreme Court altered *Wright Line* to a small degree in *NLRB v. Transportation Management Corp.*,[67] which held that it was fair to shift the burden of persuasion to the employer to prove that no anti-union animus was involved in the treatment of a union-sympathyzing employee.[68] The Court held that the First Circuit erred in interpreting section 10(c), stating that nothing "forbids placing the burden on the employer to prove that absent improper motivation" it would have discharged the employee for legitimate reasons.[69] Thus, the employer may proffer an affirmative defense to this effect, to which it bears the burden of proof.[70]

C. Artra Group v. NLRB

In the *Artra Group, Inc. v. NLRB*,[71] the Board brought unfair labor practice charges under sections 7[72] and 8(a)(1),[73] against a small Oklahoma electronics manufacturer. The Administrative Law Judge (ALJ) found fifteen separate violations of the Act, including interrogation of and threats to employees, surveillance of union activities, and two substantial layoffs designed to remove union leaders from the bargaining unit,[74] concluding that the company used these coercive tactics to impede the organization of a union. Accordingly, the ALJ enjoined the employer's anti-union activity and ordered reimbursement with back pay for laid off employees. Additionally, without providing a rationale, the ALJ issued a bargaining order based upon the discriminatory imposition of rules and coercive threats, including closure.[75]

The employer appealed the ALJ's adjudication to the NLRB. The Board upheld the ALJ's efforts in general, with slight but unsubstantial modifications.[76] The Board did, however, make two significant determi-

63. *Wright Line*, 662 F.2d at 906-07. The firing of a union employee, even a union activist, is not an unfair labor practice if his employer took the action for business reasons. The issue goes to motive of the employer.
64. *Id.* at 906, n.12.
65. 29 U.S.C. § 160(c) (1982).
66. *Wright Line*, 662 F.2d at 903-04, 904 n.8.
67. 462 U.S. 393 (1983).
68. *Id.* at 2475.
69. *Id.* at 2474.
70. *Id.* at 2473.
71. 730 F.2d 586 (10th Cir. 1984).
72. 29 U.S.C. § 157 (1982).
73. 29 U.S.C. § 158(a)(1) (1982).
74. *Artra Group*, 730 F.2d at 589.
75. *Id.* at 593. Presumably, the Act determined that a fair election was unlikely due to bias invoked by the employer's threats and prejudice.
76. *Id.* at 589.

nations. First, it rejected the company's contention that it was unaware of the union's organizational activities which would have precluded a finding of anti-union animus.[77] Second, the Board provided its own rationale for the extraordinary bargaining order issued by the ALJ.[78]

The employer challenged the Board's affirmance on several grounds. First, the employer claimed that evidence of economic necessity was inadequately considered by both the ALJ and the Board. The Tenth Circuit pointed out, however, that while the Board "could have written a more detailed opinion," it could properly rely on the ALJ's conclusions regarding the economic evidence.[79] Moreover, the court noted, the ALJ's conclusion did not constitute an abuse of discretion.[80] Second, the employer asserted that the *Wright Line* analysis had not been applied in considering its economic evidence, however sufficient. In response, the court noted that the ALJ had clearly applied *Wright Line*[81] and, more importantly, the company's evidence of economic necessity was simply insufficient as an affirmative defense.[82] Third, the employer challenged the Board's conclusion that it had knowledge of the union organization activities. On this point, the Tenth Circuit concluded that the factual determinations of the ALJ provided evidence in the record from which the Board could infer the employer's knowledge.[83] Finally, the court affirmed the bargaining order, reasoning that the Board's determination of a proper "remedy is entitled to special respect."[84] On each point the Tenth Circuit stated specifically, or clearly inferred, that the conclusion of the ALJ and determination by the Board were supported by substantial evidence.[85]

D. *Conclusion*

In *Artra Group*, the Tenth Circuit has indicated it will not question detailed procedural analysis of the NLRB where the evidence clearly demonstrates an unfair labor practice.[86] Unfortunately, however, the court accepts the Board's meager analysis for enforcing compelled bargaining. The issuance of a *Gissel* bargaining order is an extraordinary remedy, rarely levied by the Board. It defeats the purposes of elective bargaining between the parties, and should only be issued where the facts clearly warrant bypassing the traditional secret ballot election pro-

77. *Id.* at 592.

78. *Id.* at 589-90 (quoting Dutch Boy, Inc., Glowlite Division and International Union and Electrical Radio and Machine Workers, 262 N.L.R.B. 1 (1982)).

79. 730 F.2d 590.

80. *Id.* at 591. The ALJ simply concluded that the company had altered its financial records and, therefore, its defense was not credible. *Id.* at 592.

81. *Id.*

82. *See, e.g., id.* at 591-92.

83. *Id.* at 592-93.

84. *Id.* at 593.

85. *See, e.g., id.* at 590 (citing Ann Lee Sportswear, Inc. v. NLRB, 543 F.2d 739 (10th Cir. 1976)).

86. The Board made 15 separate findings of fact which lent support to the opinion that the employer had committed numerous unfair labor practices. *See supra* note 74 and accompanying text.

cess. In contrast, the Seventh Circuit requires the NLRB to give a detailed analysis of its justifications for bypassing this process as an aid to judicial review.[87] The Tenth Circuit, however, holds that the Board's choice of remedy, regardless of its extraordinary nature, is entitled to the same narrow review afforded most administrative actions by the board.[88]

III. Bargaining Unit Determination in the Health Care Industry

A. *Non-Proliferation of Bargaining Units in the Medical Industry*

1. Legislative History

In 1974 Congress amended section 2(2) of the National Labor Relation Act[89] to include employees in non-profit hospitals under federal protection and coverage.[90] Legislators in both the House and Senate discussed the issue of labor interruptions in the health care field and warned against the proliferation of bargaining units at health care facilities.[91] Congress was concerned that labor conflicts would cause interruptions or slowdowns in the delivery of health care, and that wage "whipsawing,"[92] striking in succession the several employers of a bargaining unit, would increase health care costs.[93] Additionally, Congress noted that unlike goods and materials, medical care is not "storable," and that a hospital strike could be extremely detrimental to patient care.[94] Moreover, organizational efforts themselves adversely affect patient care.[95]

The Senate rejected efforts to restrict the number of bargaining units in non-profit hospitals to four: professional employees, technical employees, clerical workers, and service and maintenance employees.[96]

87. Red Oaks Nursing Home, Inc. v. NLRB, 633 F.2d 503, 508-09 (7th Cir. 1980). The court points out that "even a cursory examination of the decisions apply *Gissel* in this circuit and other circuits reveals that the Board has declined repeatedly to assist the Courts with this expertise by revealing reasons for issuing *Gissel* bargaining orders." *Id.* at 508.

88. *Artra Group*, 730 F.2d at 593 (citing *Gissel*, 395 U.S. at 613 n.32).

89. 29 U.S.C. § 152(2) (1982).

90. Act of July 26, 1974, Pub. L. No. 93-360, § 2(2), 88 Stat. 295. *See* NLRB v. St. Francis Hospital of Lynwood, 601 F.2d 404, 411-13 (9th Cir. 1979), for a discussion of legislative history behind this change.

91. NLRB v. St. Francis Hospital of Lynwood, 601 F.2d 404, 411-12 (9th Cir. 1979) (citations to Congressional debate omitted).

92. *Id.*

93. NLRB v. Anchorage Businessmen's Ass'n, 289 F.2d 619, 621 n.3 (9th Cir. 1961) (citing NLRB v. Truck Drivers Local Union, 353 U.S. 87, 90 n.7 (1957)).

94. S. Rep. No. 766, 93rd Cong., 2d Sess. 39 (1974), *reprinted in* 2 [1974] U.S. Code Cong. & Ad. News, 3946, 3953 (views of Sen. Dominick), *cited in St. Francis Hospital of Lynwood*, 601 F.2d at 411. Mr. Dominick of Colorado expressed opposition to the compromise bill which eventually passed, warning that it would open health care institutions to organizational drives and similar disruptions, thereby impeding the administering of vital services. He predicted that even in large cities where there is no alternative to hospitals which provide specialized services, labor interruptions common to other industries could be problematic. *Id.* at 40.

95. Presyterian/St. Luke's Medical Center v. NLRB, 723 F.2d 1468, 1473 (10th Cir. 1983). Union solicitation does not enjoy the presumption of protected concerted activity in patient care areas.

96. *See St. Francis Hospital*, 601 F.2d at 411 (citations omitted).

Congress did, however, admonish the Board to prevent proliferation of such units in the health care industry.[97] Specifically, it warned that hospitals, given their critical community service, should not suffer the same administrative and labor-management problems as the construction industry.[98]

2. The Community of Interests Standard

The NLRA gives the Board few specific instructions of how to determine appropriate bargaining units.[99] The Board has established the "community of interests" standards when determining the makeup of units, based upon parameters found in sections 7[100] and 9(b)[101] of the Act. Section 9(b) instructs the board to "assure . . . employees the fullest freedom in exercising the rights guaranteed by" the Act, and section 7 allows employees to engage in concerted activities such as forming, joining, and bargaining as, a union. In order to allow employees to effectively communicate their vocational or professional interests, the Board groups employees, according to job classification, into units based upon similarity of terms and conditions of employment, duties, qualifications, earnings, and proximity as well as their stated desires.[102] Unit determination has a significant impact on the nature of collective bargaining. For instance, a larger unit may fragment as different groups of employees promote separate interests.[103]

3. The Disparity of Interests Standard

Until August of 1984 the NLRB and the circuit courts of appeals battled over unit determination in non-profit hospitals.[104] The majority of the pre-Reagan Board invoked consistantly its specialized experience and authority to determine appropriate units regardless of Congress' admonition against unit proliferation.[105] The circuit courts of appeals often rejected the Board's determinations and, on occasion, reprimanded the Board's hypocritical approach.[106] In *Allegheny General Hospital v. NLRB*,[107] the board reconsidered but refused to reverse its

97. S. REP. No. 766, 93D CONG., 2D SESS. 5 (1974), *reprinted in* 2 [1974] U.S. CODE CONG. & AD. NEWS, 3946, 3950.

98. 120 CONG. REC. 12945 (1974) (statement of co-sponsor Sen. Taft).

99. A. COX, D. BOK, and W. GORMAN, CASES AND MATERIALS ON LABOR LAW, 274 (9th ed. 1981).

100. 29 U.S.C. § 157 (1982).

101. 29 U.S.C. § 159(b) (1982).

102. A. COX, *supra* note 99, at 275.

103. *See, e.g.*, Mallinkrodt Chemical Works, 162 N.L.R.B. 387 (1966) (where the Board announced a new standard for determining whether a group of craftsmen should constitute a separate unit).

104. See Mary Thompson Hosp. v. NLRB, 621 F.2d 858, 864 (7th Cir. 1980), Alleghany Gen'l Hosp. v. NLRB, 608 F.2d 965, 966, 970 (3d Cir. 1979), and St. Vincent's Hosp. v. NLRB, 567 F.2d 588, 592-93 (3d Cir. 1977), for some of the more outstanding clashes between the Board and the Circuits.

105. J. ABODEELY, R. HAMMER, and A.L. SANDLER, THE NLRB AND THE APPROPRIATE BARGAINING UNIT, 265-66 (rev. ed. 1981).

106. *See, e.g.*, *Allegheny Gen'l Hosp.* 608 F.2d at 966.

107. *Id.* at 965.

determination of a maintenance employees' unit after the Third Circuit had remanded to the Board a nearly identical case[108] for reconsideration in light of Congressional sentiment. The circuit denied enforcement of the Board's order which sought to carve out an operating engineers unit from the existing maintenance employees unit, citing stare decisis.[109] Despite reprimands such as this, the Board applied the community of interests standard of *American Cyanimid Co.*[110] throughout the 1970s and early 1980s.

The Ninth and Tenth Circuits pioneered the "disparity of interests" standard in refusing to enforce Board unit determination orders in *NLRB v. St. Francis Hospital*[111] and *Presbyterian/St. Luke's Medical Center v. NLRB*.[112] In *St. Francis Hospital*, the Ninth Circuit borrowed the term "disparity of interests" from Senator Williams' statement in the legislative history of the 1974 amendments.[113] The court distinguished "community of interests," which groups employees into smaller units based on traditional factors, from "disparity of interests," which focuses upon those differences between groups that inhibit larger bargaining units.[114] The term is an unfortunate one. "Disparity of differences" better describes the applicable standard. The Tenth Circuit shed a great deal more light on the terminology in *Presbyterian/St. Luke's Medical Center*,[115] where it stated:

> It is . . . the dissimilarity of interests relevant to the collective bargaining process that determines which employees are not to be included in a proposed unit. The proper approach is to begin with a broad proposed unit and then exclude employees with disparate interests. One should not start with a narrow unit, such as registered nurses, and then add professionals with similar interests.[116]

The Second and Eighth Circuits have criticized the "disparity of interests" standard applied by the two western circuits as too restrictive of the employees' right to choose a bargaining representative"[117] and as requiring unnecessarily large, unmanageable units.[118]

---

108. *See* St. Vincent's Hosp. v. NLRB, 567 F.2d 588 (3d Cir. 1977).

109. *Allegheny Gen'l Hosp.*, 608 F.2d at 970 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)). "For the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law. Such an order will not be enforced." *Allegheny*, 608 F.2d at 970.

110. 131 N.L.R.B. 909, 910 (1961).

111. 601 F.2d 404 (9th Cir. 1979).

112. 653 F.2d 450 (10th Cir. 1981).

113. *St. Francis Hosp.*, 601 F.2d at 419 (citing Mercy Hospital of Sacramento, Inc., 217 N.L.R.B. 765, 766-67 (1975) (citation to Sen. Williams' remarks omitted)).

114. *St. Francis Hosp.*, 601 F.2d at 419.

115. 653 F.2d 450 (10th Cir. 1981).

116. *Id.* at 457-58 n.6.

117. Trustees of Masonic Hall and Asylum Fund v. NLRB, 699 F.2d 626, 642 (2d Cir. 1983).

118. *Cf.* Watonwan Memorial Hosp. v. NLRB, 711 F.2d 848, 850 (8th Cir. 1983).

B. Southwest Community Health Services v. NLRB

In *Southwest Community Health Services*,[119] the Board certified a group of 54 ambulance service employees intricately connected with the operator's eleven facilities, but the operator alleged the unit's impropriety and refused to bargain with it. Unfair labor practice charges were filed against the operator on which the Board granted General Counsel's motion for summary judgment.[120] The Board petitioned the Tenth Circuit for enforcement of its summary judgment order.

On appeal, the Tenth Circuit first noted that its standard of review was not the usual "arbitrary and without substantial support" test,[121] but rather the desparity of interests standard.[122] The court noted that although the justifications considered by the regional director for certification could support the presumption that the ambulance service employees performed significantly different work than that performed by potentially included groups, the correct presumption in the health care industry is that employees in other classifications might have a disparity of differences such that their inclusion would be appropriate.[123] The circuit did not hold the unit inappropriate per se, but remanded to the Board for reconsideration under the appropriate standard.[124]

C. St. Francis Hospital *and* International Brotherhood of Electric Workers Local 474

In August, 1984, the Board announced it would no longer apply the community of interests standard to non-profit hospital unit determinations.[125] It declined, however, to adopt the strict interpretation of "disparity of interests," and, instead, formulated a balancing test which considers the congressional instructions along with differences between employee groups.[126] The Board emphasized that "no unit is per se appropriate," and, henceforth, separate representation would be based upon the facts of each case in light of the "disparity of interests" standard;[127] yet, it cautioned that strict division of employees into professional and non-professional units is unwarranted.[128]

D. *Conclusion*

The Board, reconstituted in the image of the Reagan administration, has reduced tension with the courts of appeals on the health units

119. *Southwest Community Health Services*, 726 F.2d 611 (10th Cir. 1984).
120. *Id.* at 613.
121. 726 F.2d at 613 (citing Beth Israel Hosp. and Geriatic Cen. v. NLRB, 688 F.2d 697 (10th Cir.), *cert. denied*, 459 U.S. 1025 (1982)).
122. 726 F.2d at 613 (citing *Presbytarian/St. Lukes Medical Cen.*, 653 F.2d at 457; *St. Francis Hosp.*, 601 F.2d at 419).
123. *Southwest Community Health Services*, 726 F.2d at 613-14.
124. *Id.* at 614.
125. St. Francis Hospital, 271 N.L.R.B. No. 160, 1984-85, NLRB Dec. (CCH) ¶ 16,590.
126. *Id.* at 15-16.
127. *Id.* at 17.
128. *Id.* at 16-17.

issue, indicating that cases like *Southwest Community Health Services* will be fewer in the future. Given the persistant, often sharp remonstrances by the courts, the Board had little choice but to move toward what the circuit courts consider to be a strong congressional mandate.

In labor law, volatile issues must be examined from at least two perspectives. Labor groups feel justifiably more comfortable in smaller units, especially at the bargaining table, where their unique needs in the mandatory bargaining areas of wages, hours, and terms of employment[129] are considered more carefully. Additionally, hospitals, with their diverse array of services, lend themselves to proliferation of bargaining units. Coupled together, these two factors explain why it took the Board a decade to implement Congress' non-proliferation compromise, and even then not without a hint of mitigation.

The disparity of differences standard will reduce the number of bargaining units certified by the Board. In theory, this will promote peaceful labor relations. Yet the real result may be a displacement of tensions into the arena of unit fragmentation. Congress defeated a bill which would have mandated four reasonably well-defined units[130] in the final legislation, presumably because its categorizations were unduly restrictive. It would hardly reflect true congressional intent for the Board to adopt more a restrictive standard of unit determination than that rejected by Congress. Due to the patent vagueness of the legislative history,[131] the Tenth Circuit and its sister courts should now watch for unit determinations in the health care field which are too rigid to effect the rights conferred in section 7 and the duty of the Board found in section 9(b) of the Act.

IV. Limitations of Hybrid Actions Under the Railway Labor Act

A. Barnett v. United Air Lines[132]

Frank Barnett, an employee of United Air lines and a member of the Association of Flight Attendants (AFA), filed a grievance concerning his seniority status under a collective bargaining agreement between United and the union. The Railway Labor Act (RLA)[133] mandates an adjustment board, established by each airline and railway carrier, which has jurisdiction over minor labor grievances which do not merit attention of the National Mediation Board.[134] The system adjustment board, which

129. 29 U.S.C. § 159(a) (1982).

130. S. 2292, 93rd Cong., 2d Sess. (1974); *see, e.g.*, Staff of Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 93rd Cong., 2d Sess., Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974 (Comm. Print 1974) (S. 2292, reprinted at 449-61).

131. J. Abodeely, *supra* note 105 at 276.

132. 738 F.2d 358 (10th Cir.), *cert. denied*, 105 S. Ct. 594 (1984).

133. 45 U.S.C. § 151 to 188 (1982).

134. 45 U.S.C. § 184 (1982) outlines procedures for the establishment of system, group, or regional boards of adjustment. The system adjustment board utilized by United and the AFA is not unlike an arbitration panel established by many industries and unions. Under 29 U.S.C. § 185 (1982) the National Mediation Board can enpanel a National Air Transport Adjustment Board to handle major disputes. *See gernerally* De La Rosa Sanchez

included representatives of both the airline and the AFA, denied Barnett's grievance. He subsequently filed a "hybrid contract" action against the airline for breach of contract and against the union for breach of the implied duty of fair representation.[135]

The drafters of the RLA failed to anticipate hybrid actions such as *Barnett*, consequently no directly applicable statute of limitations appears in the Act. The court reviewed *Barnett* twice. In its initial opinion in March, 1984, it overruled the district court's use of the state statute and substituted the RLA's two-year limit.[136] The court determined that Congress intended to provide the airline industry with a statutory scheme similar to the rail industry; thus, the two year limitation of National Railroad Adjustment Board (NRAB) actions was applicable.[137] The court did not consider the similarity between Barnett's action and hybrid contract suits under the NLRA.

In June, 1984, the Tenth Circuit withdrew its March decision and substituted the present ruling.[138] Citing *DelCostello v. International Brotherhood of Teamsters*,[139] the Supreme Court decision which applied the NLRA six-month limit to hybrid claims, the circuit ruled the NLRA statute applies to hybrid RLA suits as well.

B. DelCostello v. International Brotherhood of Teamsters

Hybrid labor actions involve two suits. The first is a breach of contract suit brought under section 301 of the Labor Management Relations Act (LMRA).[140] The second is a breach of duty of fair representation claim brought against the union. The latter is implied from the NLRA and recognized by the Court as a necessary remedy due to the union's obligation to represent all of its members in an honest and aggressive fashion.[141] Most hybrid actions arise from arbitration decisions where the union member feels he was inadequately repre-

v. Eastern Airlines, 574 F.2d 29, 31, 32 (1st Cir. 1978) (jurisdiction on each board detailed).

135. "Hybrid" actions are cognizable in federal courts and, thus, are an exception to the pre-emption doctrine enunciated in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). The cause of action known as "breach of the duty of fair representation" was first recognized in Steele v. Louisville and Nashville R.R. Co., 323 U.S. 192 (1944), where a minority employee sued both his employer and a union under the RLA. Though the action sounds in unfair labor practice, the Board did not recognize it until 1962, and the courts until 1966. In Vaca v. Sipes, 386 U.S. 171 (1967), the Court extended federal court jurisdiction to hybrid suits, based in part on the courts' power to review arbitration decisions and in part on an employee's right to a remedy where neither the employer nor the union will afford her one. *See id.* at 184-86.

136. Barnett v. United Air LInes, Inc., 729 F.2d 693 (10th Cir.), *vacated*, 738 F.2d 358, *cert. denied*, 105 S. Ct. 594 (1984).

137. *Barnett*, 729 F.2d at 696.

138. 738 F.2d 358 (10th Cir.), *cert. denied*, 105 S. Ct. 594 (1984).

139. 103 S. Ct. 2281 (1983).

140. 29 U.S.C. § 185 (1982) provides for suits by and against unions and employers sounding in contract.

141. In Vaca v. Sipes, 386 U.S. 171 (1967), the Court held a union's duty of representation "includes" a statutory obligation to serve the interests of all members without hostility or discrimination toward any." *Id.* at 177.

sented or not represented at all and, subsequently, brings a claim against both the employer and the union. In *DelCostello*, the employee refused to drive a truck he felt was unsafe and, as a result, was dismissed. He filed a grievance and lost at arbitration.[142] Ordinarily, system adjustment board decisions are subject to very limited review by the courts,[143] but hybrid actions receive full review by the federal courts if the plaintiff shows that the union breached its implied duty to handle the worker's grievance fairly.[144]

In *DelCostello*, the lower courts applied different statutes of limitation to the workers' hybrid claims. The Court overruled the decisions in both companion cases, holding that federal courts should not borrow a state statute where a federal statute provides guidance more reflective of the practicalities of the specific litigation.[145] The Court reasoned that section 10(b) of the NLRA, governing the handling of unfair labor practice cases, was more analogous to hybrid actions than state remedies[146] and lended itself to uniformity in section 301 actions.[147] Thus, *DelCostello* implemented the six-month limit of section 10(b).

C. *Discussion*

In *Barnett*, the court's application of *DelCostello* to hybrid RLA suits stretches the Supreme Court's holding. While the state statutory limit is less appropriate than a federal limit, the proper issue is which federal statute of limitations is appropriate for hybrid RLA actions. The court found "identical competing interests" between *DelCostello* and *Barnett*, in rejecting the RLA two-year limitation.[148] The comparison is deceiving. The interests in *DelCostello* were those of the state and federal statutes of limitations, where the federal limitation appears in the Act under which the cause of action arose, and the state limitation rule applied to ordinary contract or malpractice actions which have nothing to do with federal law. The competing interests in *Barnett* appear as tension between a federal limitation designed specifically for the rail and air industries and a limitation which governs unfair labor practices under a separate federal act.

The Tenth Circuit based its decision to apply the section 10(b) statutory limit rather than the RLA limit, on a similarity between the RLA hybrid action and the classic NLRA hybrid action. It appears, though it is not clear, that there are two reasons for this arrival. First, both statutes apply the same threshold test for full review of a hybrid claim, re-

142. *DelCostello*, 103 S. Ct. at 2286.

143. Exclusive jurisdiction to interpret a collective bargaining agreement is vested in the adjustment boards pursuant to 45 U.S.C. § 184 (1982). *See* Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co., 199 F.2d 384, 385 (5th Cir. 1952) (citations omitted).

144. *Vaca*, 386 U.S. at 185.

145. *DelCostello*, 103 S. Ct. at 2294.

146. *Id.* at 2293.

147. *See, e.g.*, *id.* at 2292-93 n.18, 19 (citations omitted).

148. *Barnett*, 738 F.2d at 363.

quiring that the plaintiff show breach of the implied duty of fair representation. Second, application of the two-year RLA limitation is vague and no other limitation directly governs hybrid suits. The two year statutory limit appears in a section setting forth practice of the National Railroad Adjustment Board,[149] which does not control grievances such as that of Barnett. This same statute, however, is incorporated in the section creating the National Air Transport Adjustment Board[150] which had enough relevance to this case to have been said to fit "hand in glove" with the *Barnett* case on first hearing at the circuit.[151]

D. *Conclusion*

Very little evidence of Congressional intent appears in the final decision of *Barnett*. Instead the decision seems to hinge on Congress' intent to provide uniform limitations periods for similar suits. The Tenth Circuit applied *DelCostello* blindly, and giving little, if any, rationale for withdrawing its first decision which applied the RLA statute of limitations. It is an ironic decision, given that the case arose under the RLA, and that the cause of action of breach of fair duty of representation arose originally under the RLA.[152]

V. Other Tenth Circuit Labor Decisions

A. Donovan v. United Video, Inc.

In *Donovan v. United Video, Inc.*,[153] the Tenth Circuit upheld a district court ruling which found that microwave system engineers were not "administrative employees" for purposes of the Fair Labor Standards Act (FLSA).[154] The court also upheld the lower court's determination of back wages due the engineers despite the fact neither party kept accurate records.

Section 13(a)(1) of the FLSA[155] exempts "bona fide executive, administrative, or professional" employees from overtime compensation regulations found in section 7(a)(1)[156] of the Act. The Department of Labor and the courts use two tests to determine whether work performed by employees designated by their employers as "administrative" is, in fact, exempt from overtime provisions.[157] The "short test"[158] used in *United Video* applies to persons earning more than $250 per

149. 45 U.S.C. § 153 First (r) (1982).
150. 45 U.S.C. § 185 (1982).
151. *Barnett*, 729 F.2d at 696 (quoting United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 64 (1981)). *United Parcel* is a somewhat moot decision which should be utilized with great care based upon its irregular procedural context. *See United Parcel*, 451 U.S. at 65-71 (Stewart, J., concurring).
152. *See supra* note 128.
153. 725 F.2d 577 (10th Cir. 1984).
154. 29 U.S.C. §§ 201 to 219 (1982).
155. 29 U.S.C. § 213(a)(1) (1982).
156. 29 U.S.C. § 207(a)(1) (1982).
157. 29 C.F.R. § 541.2 (1984).
158. *Id.* § 541.2(e)(2).

week, while the "long test,"[159] more precise in nature, applies to persons earning less than $250 per week.

The Secretary of Labor brought suit against the employer to enforce the overtime and record keeping requirements of the Act. The district court found the engineer's primary duty was to maintain the microwave systems, a responsibility which, for the most part, involved truck driving and equipment inspection. The district court concluded that the employer had violated the Act and determined the amount of back wages due. The court of appeals affirmed.[160]

The employer objected to the court's ruling on back wages on the grounds that the number of overtime hours worked by the complaining engineers was not settled. The circuit applied *Anderson v. Mount Clemens Pottery Co.*,[161] wherein the Supreme Court stated that the grieving party's burden in a FLSA case is to show that he has performed work for inadequate compensation, given that the court can reasonably infer the amount of that work from the evidence. The burden then shifts to the employer to negate the allegation as to amount and, should he fail, the court may award damages to the employee, albeit based upon a approximation drawn from the evidence.[162] As the employer could not come forward with precise records as to hours worked, the district court's determination of back wages, based on the Secretary of Labor's calculations from depositions and payroll records, was affirmed.

B. Jefferson County Community Center for Development Disabilities Inc., v. NLRB

In *Jefferson County Community Center for Developmental Disabilities, Inc. v. NLRB*,[163] the Tenth Circuit enforced board orders directing a community health care facility to bargain with and supply information to an employee's union despite the facility's insistence that it was a political subdivision of state government and, therefore, beyond the jurisdiction of the NLRB under section 2(2)[164] of the Act. Section 2(2) of the NLRA, which gives the board jurisdiction over labor-management relations, exempts states and their political subdivisions from its provisions.[165]

The circuit outlined a two part test for qualification as a political subdivision: that the entity be either created by the state as an arm of government, or administered by those responsible directly to public officials or the electorate.[166] The court found that while the health care

159. *Id.* § 541.2(a) to (e).
160. *United Video*, 725 F.2d at 583-84.
161. 328 U.S. 680 (1946).
162. *United Video*, 725 F.2d at 583-84 (citing Anderson v. Mount Clemens Pottery Co., 328 U.S. at 687-88; Donovan v. Simmons Petroleum Corp., 725 F.2d 83, 85-86 (10th Cir. 1983)) (other citations omitted).
163. 732 F.2d 122 (10th Cir.), *cert. denied*, 105 S. Ct. 591 (1984).
164. 29 U.S.C. § 152(2) (1982).
165. For purposes of the Act, the term "employer" does not include "any state or political subdivision thereof." *Id.*
166. *Jefferson County*, 732 F.2d at 124 (citing NLRB v. Natural Gas Util. Dist., 402 U.S.

center contracts with the state on a regular basis, the state did not create the center, nor did the facility fall within the heirarchy of an arm of government.[167] There was no evidence to conclude that the administration of the center answered to public officials or the public;[168] moreover, the method for removing Board members was self-contained, with no room for involvement by the state. Additionally, the facility's lack of power to issue tax-exempt bonds, issue subpoenas, or exercise eminent domain further distinguished it from political entities.[169]

The facility offered another reason for its exemption. It claimed that because its business primarily involved contracts with and grants from governmental agencies it lacked "sufficient control over the employment relationship" to bargain effectively.[170] The court of appeals recognized that the facility's ability to bargain might be restricted but held that it controlled bargaining over "wages, benefits, hiring, firing, promotion, discipline and grievances" sufficient to be able to bargain effectively.[171]

Greg Shannon Russi

600, 604-05 (1971); Board of Trustees of Memorial Hosp. v. NLRB, 624 F.2d 177, 184 (10th Cir. 1980)).

167. *Jefferson County*, 732 F.2d at 125.

168. *Id.* at 126.

169. *Id.*

170. *Id.* (citing *Board of Trustees of Memorial Hosp.*, 624 F.2d at 185).

171. *Jefferson County*, 732 F.2d at 127.